Patents, the Federal Circuit, and the Simply Property Perspective

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A New Day in Patents?

"Appealing from a decree adjudging the patent valid, but not infringed, plaintiffs are here . . . [complaining] of the decree as another in that long and growing list of judgments in patent infringement suits which, finding the patent valid but not infringed, keep the promise of the patent to the ear while they break it to the hope . . . ."

Matthews v. Koolvent Metal Owning Co., 158 F.2d 37, 38 (5th Cir. 1946)

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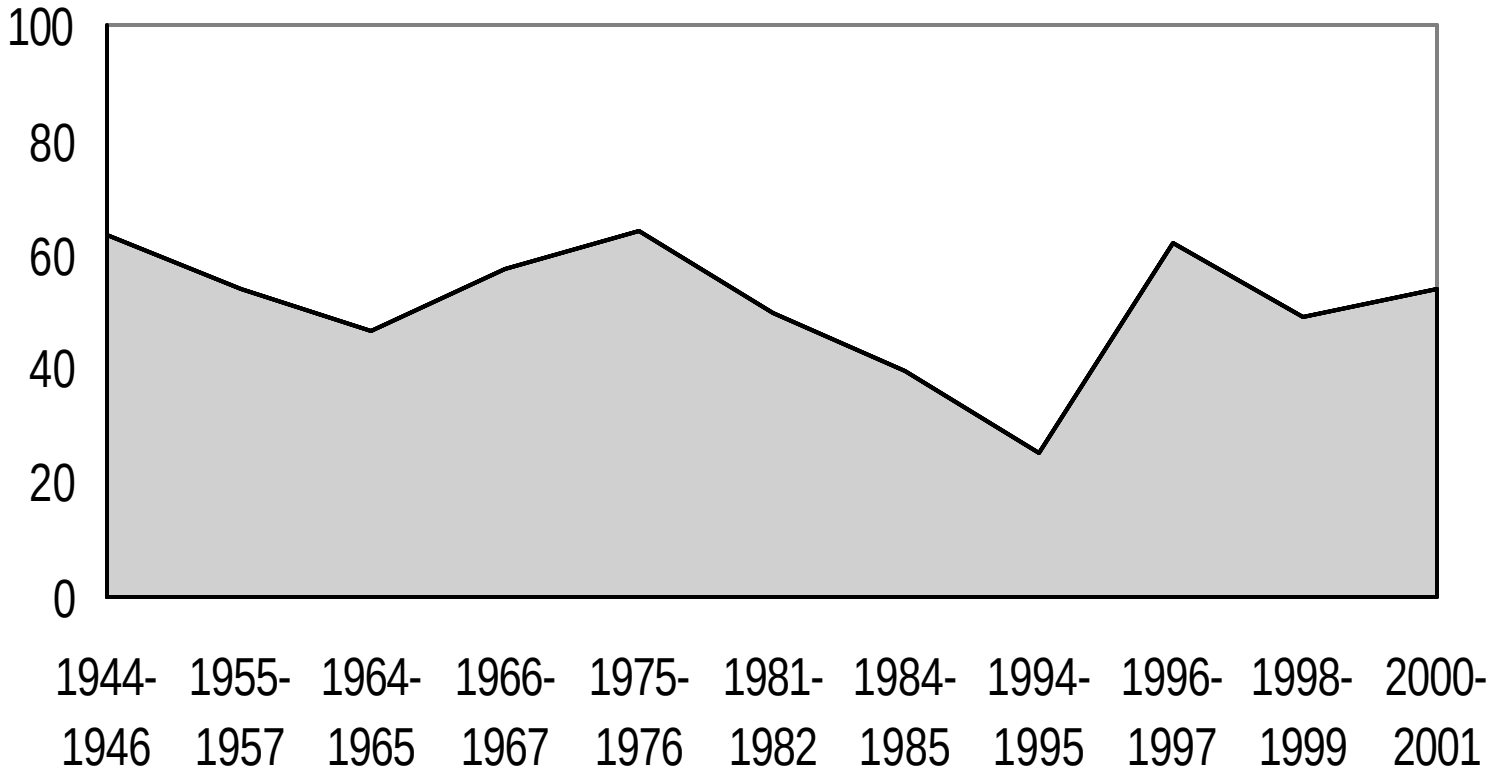
Invalidity of Litigated Patents



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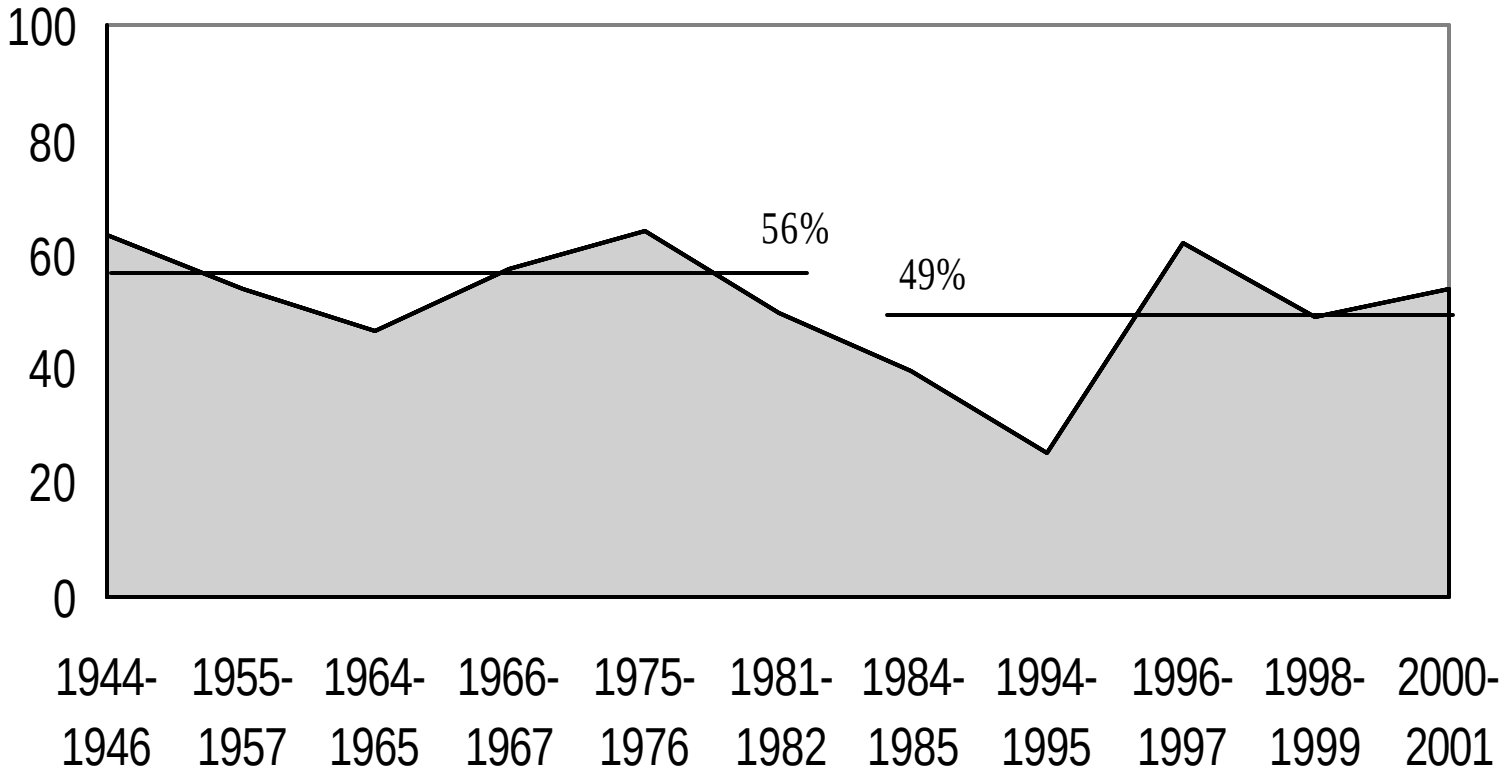
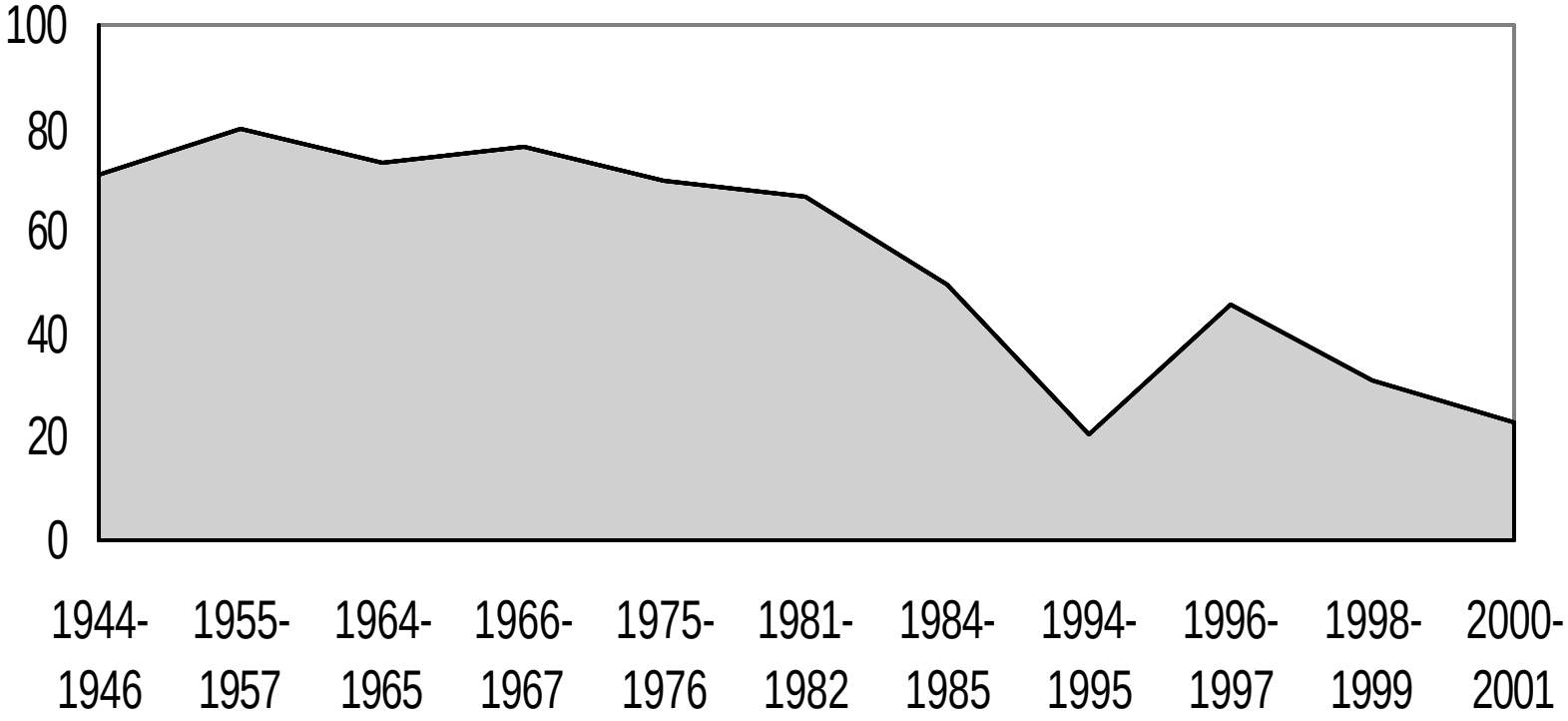


Obviousness as Basis for Invalidity



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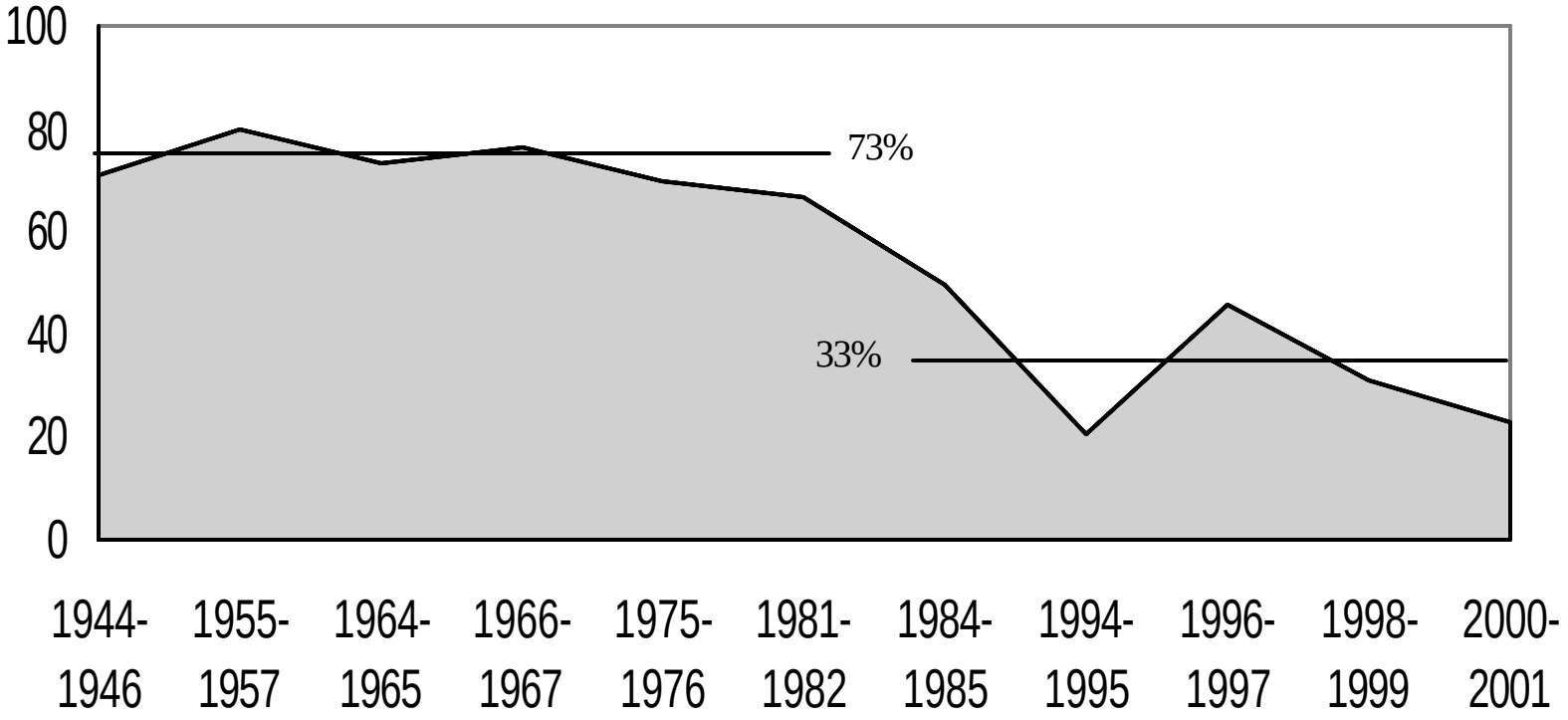
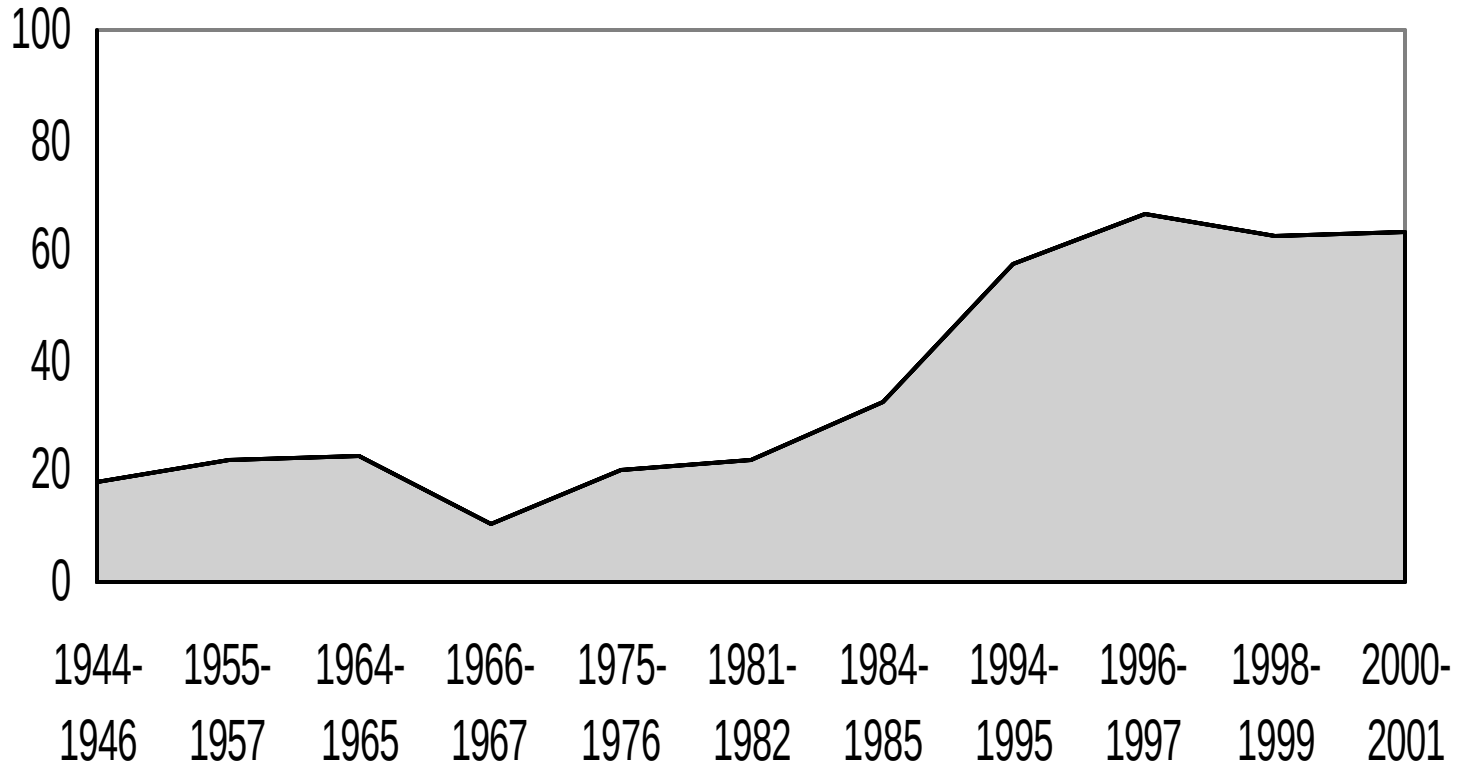


Invalidity Not Addressed



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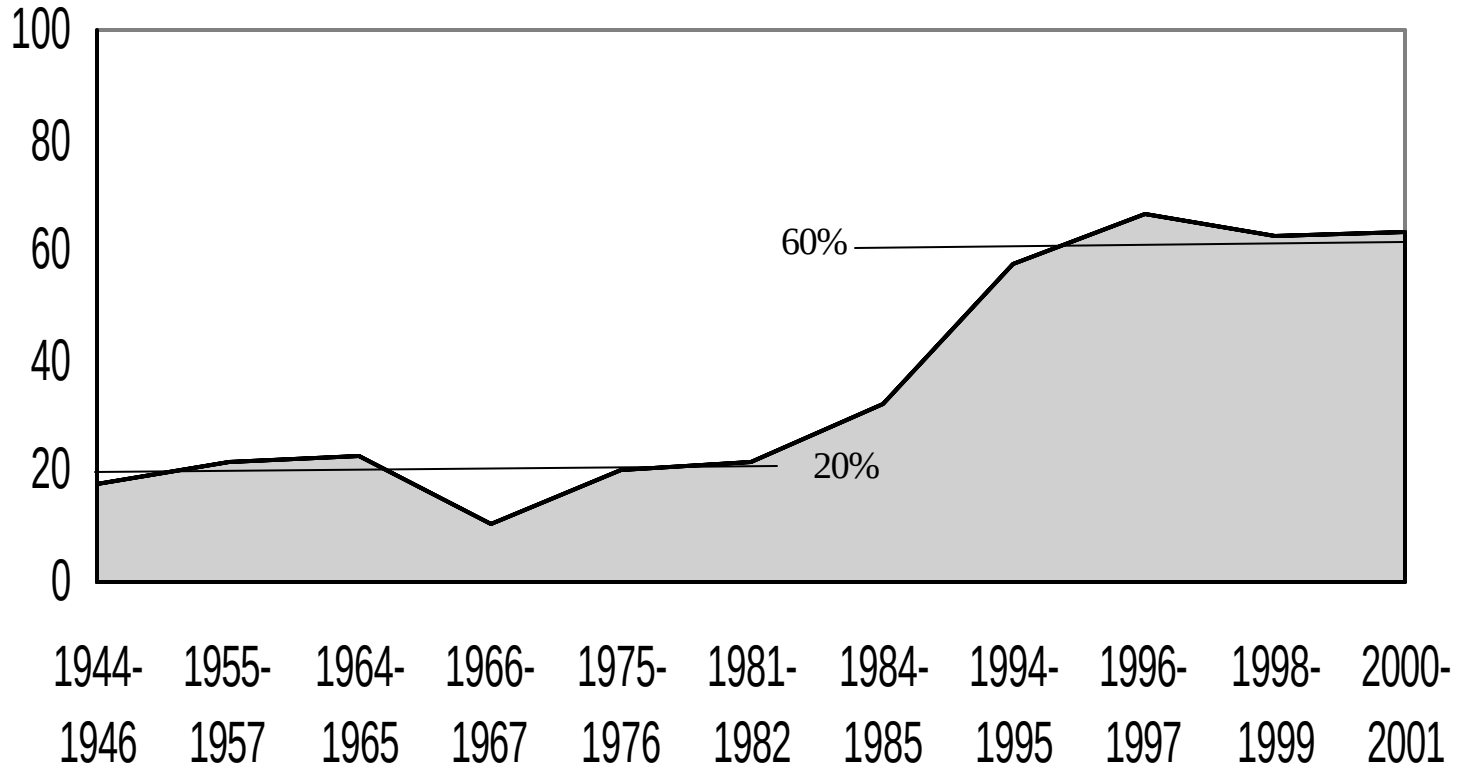

The Simply Property Perspective

A patent, under the statute, is property. 35 U.S.C. § 261. Nowhere in any statute is a patent described as a monopoly. The patent right is but the right to exclude others, the very definition of "property."

Carl Schenck, A.G. v. Nortron Corp., 713 F.2d 782, 786 n.3 (Fed. Cir. 1983)

Nonobviousness & Perspective

- Traditional Perspective: Balance of Incentives and Deadweight Loss

- "The inherent problem was to develop some means of weeding out those inventions which would not be disclosed or devised but for the inducement of a patent."

Nonobviousness & Perspective

- Simply Property Perspective: No Monopoly; No Deadweight Losses
- Cost-Benefit Balance Shifts Sharply in Favor of Patents
- Presumptive Entitlement to Patent

Nonobviousness & Perspective

- Traditional Perspective: High Standard for Nonobviousness

- Property Perspective: Low Standard for Nonobviousness

Investment Choices Available

Set 1	Set 2	Social Value
1-A	2-A	10
1-B	2-B	8.75
1-C	2-C	7.5
1-D	2-D	6.25
1-E	2-E	5

Resource Constraint: Four Investments Only

Necessary Assumption

- Some desirable innovation will occur even without the expectation of receiving a patent
- Some desirable innovation will not occur without such an expectation
- Use Sets 1 and 2 to reflect this assumption

Case 1: No Patent

Set 1	Priv. Ret.	Set 2	Priv. Ret.
1-A	6	2-A	5
1-B	5.75	2-B	4.75
1-C	5.5	2-C	4.5
1-D	5.25	2-D	4.25
1-E	5	2-E	4

Case 2: Patents for Set 2 Only

Set 1	Priv. Ret.	Set 2	Priv. Ret.
1-A	6	2-A	6
1-B	5.75	2-B	5.75
1-C	5.5	2-C	5.5
1-D	5.25	2-D	5.25
1-E	5	2-E	5

Case 3: Patents for Both

Set 1	Priv. Ret.	Set 2	Priv. Ret.
1-A	7	2-A	6
1-B	6.75	2-B	5.75
1-C	6.5	2-C	5.5
1-D	6.25	2-D	5.25
1-E	6	2-E	5

Conclusion from Model

- Case 2 Represents a High (or “Weeding Out”) Standard of Nonobviousness
- Case 3 Represents a Low Standard of Nonobviousness
- High Standard of Nonobviousness Preferred

The Model's Perspective

- In reaching this conclusion, model does not rely on any notion of monopoly or deadweight losses

- Simply focuses on how our choice of a nonobviousness standard likely affects the allocation of scarce resources

Next Step: Define Obviousness

- Distinguishing Set 2 and Set 1 Investments
- Identify Reason(s) Why Some Desirable Innovation Occurs Without Patents While Other Desirable Innovation Will Not

Possible Key:

The Creative Investment Fraction